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## **Tobacco Bill's "Secondhand Smoke" Provisions: An Unfunded Mandate on State and Local Governments and on Private Business**

### **But it Could Prove a Dream Come True for Busybodies and Trial Lawyers**

In its attempts to reduce involuntary exposure to tobacco smoke, the tobacco bill currently pending in the Senate (what we're calling "Commerce-2") places a new mandate on state and local governments and on most of the nation's businesses — a mandate with a considerable price tag, one that likely will outweigh the merits.

*Imagine that you are the owner of a small retail shop in Small Town, U.S.A. Several people (adults, not teenagers) on occasion stand outside your store's entrance. Some of them are smoking, but you are in the back and don't always see them there; it's not your property, anyway. A passerby is offended by the cigarette smoke and files a complaint in court. You are now in violation of federal law, and are subject to thousands of dollars in penalties. Your profits are marginal this year, but you must hire a lawyer and spend a lot of money defending yourself from this lawsuit.*

Is this fantasy? No, it's a fair and likely possibility of the way things will be if Commerce-2 becomes law.

Title V of Commerce-2 mandates that "public facilities" adopt a smoke-free environmental policy. Almost any facility that is "regularly entered by 10 or more individuals at least one day per week" is a "public facility." Defined exceptions to the mandate are residences, restaurants (except that "fast food restaurants" as they are fully defined by future government regulations, *do* fall under the mandates), bars, private clubs, hotel rooms or common areas, casinos, bingo parlors, tobacconists' shops and prisons.

That leaves under the mandate almost every other place where people congregate, including office buildings, shopping malls, supermarkets, and small retail shops (like the corner grocery, florist, dry cleaner, or drug store). Owners — or, in some cases, tenants — of these facilities *must prohibit smoking* within the building as well as outside the entrance to the building (whatever the government later defines as "within the immediate vicinity of the entrance to the facility") and must install "no smoking" signs in prominent places. Owners (or tenants) of "public facilities" may, at their own expense of course, provide areas where smoking is allowed — but only under specific conditions that would be far too costly for many businesses. Requirements for a smoking area include the installation of a government-

approved ventilation system, and maintaining the area at "negative pressure." Further, the room must be a place that nonsmokers do not have to enter for any purpose.

The bill requires the head of the Occupational Safety and Health Administration (OSHA) to create a regulatory program that *protects the public from the health effects* of environmental tobacco smoke, not simply exposure to tobacco smoke — a much higher standard and one that requires the use of questionable EPA "science" (see further discussion of the science, below). (This stronger standard, incidentally, was one the strings required to get White House endorsement of this bill.) Under these new provisions before issuing its regulations, OSHA *must* first consult with the Administrator of the Environmental Protection Agency, the government entity which already has declared secondhand tobacco smoke a "group A" ("known") carcinogen. Thus, the regulatory regime likely essentially will be a creature of EPA's science.

What does this mean to millions of business owners, large and small, in cities and rural areas across the nation? — that they must expend unknown amounts of capital to comply with and enforce a federal mandate under penalty of law. Not only must they enforce the mandate within the confines of their shop, but "within the immediate vicinity of the entrance" as well.

### **The Bill's Citizen Action Provisions**

On top of that, the bill provides that *any aggrieved person* can bring an action in a federal district court to enforce the mandate, following a 60-day notification. Penalties of up to \$5,000 per day plus court costs can be assessed. It's unclear what the cost of such lawsuits to the district courts might be, or the delay such suits would place on other court business, but it's a certainty they would add to the already backlogged dockets of most federal district courts. Further, the bill gives an incentive for do-gooders, busybodies and looking-for-extra-work trial lawyers since it does provide for court costs, including attorney fees and expert witness fees, to be awarded to the prevailing plaintiff. And here's an extra bonus for anti-smoking zealots: the court in consultation with OSHA may decide what anti-smoking projects shall be funded from the penalties.

### **The Burden on States, Counties, and Towns**

States and local governments, too, fall into the Fed's sights. The states of course must enforce this new mandate in all government-owned public buildings. New costs may include the building of costly no-smoking areas, or simply the costs of permitting smokers more time to go outside and across the street for breaks. The bill does provide that state and local governments can opt out of the requirements of Title V — but *only* if they promulgate a law that is *as or more protective* of the public's health than the federal standard, based on the "best available science." Further that state or local law must be certified by OSHA, after consultation with EPA, the arbiter on what *is* the best available science.

### **The Science of Smoke in the Air**

The science, however, is vague. EPA has declared environmental tobacco smoke a carcinogen that causes 3,000 lung cancer deaths each year. However, this conclusion is under dispute. EPA was roundly criticized in 1993 for the scientific evaluation that led it to rule second-

hand smoke a class-A carcinogen. The EPA study amalgamated 11 studies into one group — what EPA called a *meta-analysis*. Critics say that such combinations may be valid, but if the individual studies were not done the same way, then the results may be suspect. Alfred P. Wehner, president of Biomedical and Environmental Consultants Inc. of Richland, WA, said, "I did work for the EPA in the past and thought of them reasonably well, but when I saw that report, I was really embarrassed. It was a bad document. . . . To get scientifically valid data, there are very strict rules and requirements on how and when you can apply meta-analysis, and virtually all of them were violated in the EPA analysis." [*Investor's Business Daily*, 1/28/93]

In response to requests by Congress to review the literature associated with secondhand smoke, the Congressional Research Service (CRS) in testimony before the Senate concluded that the "statistical evidence does not appear to support a conclusion that there are substantial health effects of passive smoking." And, CRS in a written report for Congress found that "even at the greatest (exposure) levels, the measured risks are still subject to uncertainty" ["CRS Report for Congress: Environmental Tobacco Smoke and Lung Cancer Risk," 11/14/95].

### **An Unfunded Mandate with Questionable Merit**

The tobacco bill's Section 502 states that its onerous new second-hand smoke policy is required "in order to protect children and adults from cancer, respiratory disease, heart disease, and other adverse health effects from breathing environmental tobacco smoke." One could argue that the tobacco bill relies on disputable evidence to create a program that amounts to a very large unfunded mandate on state and local governments, and on private businesses.

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